United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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76-1004

To be argued by
LEE A. ADLERSTEIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1004

UNITED STATES OF AMERICA,

Appellee,

—against—

LAWRENCE ALFANO,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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Preliminary Statement

Lawrence Alfano appeals from a judgment of conviction of the United States District Court for the Eastern District of New York (Judd, *J.*), entered December 5, 1975, which judgment convicted appellant, after a jury trial, on two counts for possession of stolen airline passenger tickets having a value in excess of $100 knowing such tickets to be stolen, in violation of Title 18, United States Code, Section 659. Judge Judd sentenced appellant to imprisonment for 2 years, concurrent on both counts, and a $1,000 fine on count one. Execution of this sentence has been stayed pending the outcome of this appeal.

On appeal, appellant asserts two grounds upon which he alleges his conviction should be reversed: (1) an inadequate evidentiary foundation was laid for various

documents accepted into evidence over defense objections; (2) evidence of "subsequent similar acts" of the appellant should not have been received.

Statement of the Case

A. Introduction and Summary

The indictment charged Lawrence Alfano with possession of five airline tickets stolen from an interestate shipment of freight. Two of the tickets contained the names of Alfano's children and were used on a June 24, 1973 flight from New York to Fort Lauderdale, Florida. Three tickets were made out to members of a family named Maltese and were used for a flight from New York to Miami on July 23, 1973. The Government offered proof that the five tickets had been stolen in April and May, 1973 from two shipments of blank tickets originating in Tennessee and destined for Newark, New Jersey. Alfano's grand jury testimony, introduced into evidence during the trial, contained an admission that his children had used two of the tickets, that he had given tickets obtained from the same source (one Michael Argondizzo) to the Maltese family and, in fact, obtained tickets similarly for other friends[1] (A-124) and his own use, at attractive discount prices (A-120).

Other incriminating evidence consisted of appellant's own words. Alfano's telephone conversation with a prospective purchaser of airline tickets revealed his familiarity with arranging such purchases through his

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[1] Page references preceded by "A" refer to Appellant's Appendix. Page references preceded by "T" refer to parts of the transcript which have not been included in the appellant's appendix. For the convenience of the Court, the Government is filing an appendix consisting of the transcript pages, referred to in this brief.

"source" and his use of such tickets without "getting nailed." [2] Two defense witnesses, one of whom pleaded the Fifth Amendment during cross-examination, failed to convince the jury that appellant had purchased the tickets believing they were validly issued.

B. The Government's Case

Socrates Georgeades, a 27 year veteran of the ticket sales division of the Rand-McNally corporation, was the Government's first witness. Mr. Georgeades testified that Rand McNally prints airplane tickets for distribution by the Air Transport Association ("A.T.A.") to the major airlines. He identified Government's Exhibits 1 through 5 (the airplane tickets that were the subject of the indictment) as being Rand McNally tickets manufactured at Nashville, Tennessee (E 1 through E-5). Other documents identified by Mr. Georgeades reflected a theft of these tickets while they were in transit from Tennessee to New Jersey.[3]

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[2] The taped conversation is reproduced at the back of Appellant's Appendix, as part of the exhibits admitted at the trial, E-16 to E-22.

[3] These documents were: an A.T.C. order for tickets to be sent to the Greenwald Travel Service, Clifton, New Jersey, such order covering the ticket serial numbers on Exhibits 1 and 2 (Government's Exhibit 11 at E-11); the shipper's bill of lading issued to Rand McNally covering the shipment of Exhibits 1 and 2 (Government's Exhibit 12 at E-12); airway bill of the carrier used by the shipper pertaining to the shipment of the same Exhibits (Government's Exhibit ~~13~~ 20 at E-~~13~~ 24); uniform airbill of Allegheny Airlines, reflecting shipment to Newark, New Jersey (Government's Exhibit ~~14~~ 21 at E-~~14~~ 25); over-short-damage report made out by the carrier showing that the cartons containing Exhibits 1 and 2 was stolen from the carrier's Newark, New Jersey dock on April 26, 1973 (Government's Exhibit 22 at E-26).

With respect to Government's Exhibits 3, 4 and 5 (the air-

[Footnote continued on following page]

George Zackaroff, an employee of Wings and Wheels Express, Inc. the shipper used by Rand McNally, identified all the shipping documents that had been identified by Georgeades, with the exception of the A.T.C. ticket order forms. Mr. Zackaroff's interpretation of the documents (A. 95-99) was consistent with that of Mr. Georgeades; the tickets were shipped from Nashville to Newark and were stolen in transit (A. 31-33).

Frank Scinta, an investigator for A.T.A., confirmed Mr. Georgeades' statement that Government's Exhibits 1 through 5 were requisitioned by New Jersey travel agencies and shipped from Rand McNally. Mr. Scinta explained further that he investigated the loss of the tickets after the airlines had missed payment for them (A. 41-42). He stated that his office records showed that the travel agents had never received the tickets. A check with Rand McNally established that the tickets had been shipped out, and the shipper had reported the tickets as "missing". Mr. Scinta further explained that appellant was not authorized by the A.T.A. to sell tickets (A. 45-46).[4]

The remainder of Mr. Scinta's testimony disclosed that authorized airplane ticket sellers are provided a blacklist of stolen tickets in order to prevent the making of refunds for such tickets (A. 47). Markings on the five tickets on which the Government's case was based showed that the tickets had been validated with counterfeit stamps (A. 69).

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plane tickets that were the subject of Count Two of the indictment), Mr. Georgeades identified documents showing theft of these airplane tickets prior to May 29, 1973 while in transit from Tennessee to New Jersey (Government's Exhibit 6 through 10 at E-6 through E-10).

[4] Only travel agents authorized by A.T.A. may sell A.T.A. tickets (A. 45).

The Government's principle evidence consisted of appellant's grand jury testimony and his telephone conversation, overheard pursuant to a state court order. Alfano told the grand jury that he flew to Florida on Eastern Airlines in July, 1973, using tickets purchased at 1/3 discount through a man named "Charlie," introduced to appellant through one Michael Argondizzo (A. 117, 120-21). Two of Alfano's children used tickets similarly purchased on a June, 1973 trip to Florida (A. 130). Alfano sold other tickets he procured from Argondizzo to Steven Maltese (A. 123, 128-29). It should be noted that the tickets comprising Government Exhibits 1 and 2 contain the names of two of appellant's children and reflect a June 24, 1973 flight from New York to Florida; Government's Exhibits 3, 4 and 5 contain the names of three members of the Maltese family for a July 23, 1973 flight. The documentary evidence and Alfano's grand jury testimony are consistent. The first flight thus took place two months after the first ticket theft; the second flight occurred approximately one month after the second ticket theft.

The telephone conversation [5] between appellant and a woman named June on August 7, 1973, began with a discussion between the two of a projected purchase by June through appellant of discount tickets from a man named "Mike." Appellants states 'I got [Mike] right here now." There is discussion of the seller's requirements that money for the tickets be paid in advance. Appellant states that it is the practice of the seller to deliver the tickets "about the day before" they are to be used. There then occurs the following sequence in the conversation:

> June: Now let me ask you something though.
> Appellant: What?

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[5] The transcript of the conversation comprises Government Exhibit 19 and is reproduced in Appellant's Appendix at E-16 to E-22.

June: If I get nailed with them . . . what am I out the bread?

Appellant: Ah well it's all according how it happens. There should be no reason you should get nailed, there's only one way you could possible get nailed with them . . . that's if you try for a refund. . . You lose the ticket, if you try for a refund then you gotta get nailed . . . that's about the only way I heard of anybody ever having a problem with these things.

June: But just flying with them, you got nothing to sweat.

Appellant: No problem, I just came back myself, I took my whole family, and I would never do that if I didn't think it was sure, right?

Toward the end of the conversation there was reference to a money-in-advance requirement for purchase of tickets:

Appellant: He can't get the tickets without cash. How's he gonna get, ticket, get em without the people he gets it from want to get paid. . . Now I collect it from the people, that I, I give em to, then it's my problem you know. . . But in the meantime, he's got to have his money (E-22).

C. The Defense Case

Michael Argondizzo, called as a defense witness, testified that he had bought from a man named "Charlie" tickets that he later gave to appellant. "Charlie" had represented himself to be a travel agency employee, and had stated that 25% discount tickets were "executive" in nature and were part of an airline "promotion" (T. 248-251).

On cross-examination, Mr. Argondizzo was confronted with his grand jury testimony and refused to answer (T. 267-69). He continued to invoke his rights under the Fifth Amendment when asked if he knew Mr. Maltese ("Steve the Hawk") and when he was asked whether he and appellant had purchased tickets from Mr. Maltese (T. 314-316).[6]

Judith Varisco, a four year acquaintance of Alfano's testified that she was the person who had the taped conversation with him. She stated that a man named Wally had put her in touch with a man named "Mikie", who had sold her the tickets. At the time of her purchase "'Mikie" presented her with a card from a travel agency. During cross-examination Ms. Varisco attempted to explain the telephone conversation: she was afraid of losing her money if she paid in advance (T. 337); she did not learn that appellant was selling tickets until the recorded conversation took place (T. 341); she did not know why tickets could not be issued in advance of payment (T. 344); her "get nailed" reference stemmed from her reluctance to receive a full-value refund when she had purchased the tickets at a discount. During re-direct examination, Ms. Varisco stated that appellant had at one point told her the tickets were "executive discount" (T. 355).

D. Government's Rebuttal

Frank Scinta was called as the Government's rebuttal witness. He testified that he had never heard of "executive tickets" or "promotional tickets" (T. 366). Mr.

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[6] On February 17, 1976, after a hearing, Judge Judd found Mr. Argondizzo to have been in contempt of court for failure to answer questions during this trial. A seven day jail sentence was imposed and has been served.

Scinta explained that discount tickets are not sold to the public and that discount sales are issued t. A.T.A. personnel only, and under closely controlled conditions:

> We are issued vouchers that reflect the routing of the ticket, the name of the employee, the ticket is then purchased at an airline ticket counter by using an air travel card, a credit card, and then the airline issues the ticket and the ticket in turn reflects in the ticket designator block, I.D., meaning fifty percent industry at fifty percent. The ticket in turn will reflect the fifty percent fare (T. 367).

Lastly, Mr. Scinta stated that all discount tickets are imprinted with the price actually paid, rather than the full retail price (T. 372). It should be pointed out that the tickets comprising Government's exhibits 1 through 5 did not have value properly listed (A. 28).

ARGUMENT

POINT I

There was adequate foundation for the admission of business records into evidence.

The Government's proof traced the requisitioning of blank airline tickets by two New Jersey travel agencies, the shipment of the tickets from Tennessee and the failure of parts of two shipments to reach their destination. Five of the missing tickets, appellant Alfanc admits, found their way into his hands. Two were presented by his children for passage to Florida on June 24, 1973 and three were used by Malteses for a trip to Florida on J.ly 23, 1973 (Appellant's Brief at 4-5). Appellant having testified before a grand jury on February 24, 1974 that he had on various occasions purchased tickets

at a discount from one Michael Argondizzo for his own use and for his friends (*Id.* at 5) now asks this Court to invalidate his conviction because "virtually all of the documents received in evidence to establish the essential elements of theft and the interstate character of the shipment lacked adequate evidentiary foundation." In support of his argument appellant cites Rule 803(6) of the Federal Rules of Evidence which permits the introduction into evidence of a

> memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or *other qualified witness* . . . (emphasis supplied).

The Government fully met the standards of Rule 803(6) with respect to all of the documentary evidence in the case. Mr. Georgeades was fully qualified, on the basis of his experience with Rand McNally, to identify each ticket as having been manufactured in Nashville. His identification of the release orders (Exhibits 6 and 11), the shipping documents (Exhibits 7, 8, 9, 19, 20, and 21) as well as the Wings and Wheels "over-short-damage reports" [7] (Exhibits 10 and 22) demonstrated that these documents were prepared in the course of regularly conducted business activity and set the stage for the subsequent identification of Wings and Wheels documents by Mr. Zackaroff. All Wings and Wheels documents identi-

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[7] The Court clarified the fact that the "over-short-damage" reports were "regular business" reports (22).

fied by Mr. Georgeades were taken as "subject to connection" by the trial judge (A. 25).

Mr. Zackaroff completed the evidentiary foundation for the Wings and Wheels documents. His testimony made it clear that the shipping documents and the over-short-damage reports were business records showing shipment and theft of the tickets (A. 31-32). Further, defense counsel did not object on a lack of foundation basis to the conclusions stated by Mr. Zackaroff. Such an objection was clearly necessary under Rule 103(a) of the Federal Rules of Evidence,[8] particularly in view of defense counsel's silence when Judge Judd stated to the prosecutor: " . . . will you make copies of Exhibits 11 and 12 and 20 through 22, so they can be available for the jury," and the reply of the prosecutor that he would do so (A. 32).

Appellant argues again that the lack of proper foundation for the evidence showing shipment and theft of the airline tickets was reflected in the testimony of Mr. Scinta, when the trial judge permitted Mr. Scinta to explain the commencement of the investigation that led to appellant, without *first* introducing testimony by each party who had supplied a link in the chain of evidence uncovered by Mr. Scinta (A. 42-43). The Government submits that Mr. Scinta's comments were not part of the foundation for the admission of the documentary evidence (other than the A.T.A. requisition papers); such

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[8] Rule 103(a) provides:

> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . .
>
> In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context.

foundation had been supplied by the two earlier witnesses. His testimony centered largely on the five airplane tickets referred to in the indictment and the circumstances showing that the tickets were not valid.

Appellant's contention that "not one of the witnesses called by the Government had any personal knowledge of the subject matter of their testimony," is inapposite. The Advisory Committee Notes accompanying Rule 803(6) make it clear that it is not necessary to produce all persons who gather, transmit and record information:

> [the rules] abolish the common law requirement [that necessitates accounting for all participants] in express terms, providing that the requisite foundation testimony might be furnished by the custodian or other qualified witness.

Such was the law well before enactment of the Federal Rules of Evidence. *United States* v. *Rosenstein*, 474 F.2d 705, 710 (2d Cir. 1973); *United States* v. *New York Foreign Trade Zone Operators, Inc.*, 304 F.2d 792, 796 (2d Cir. 1962). See *United States* v. *Tellier*, 255 F.2d 441, 448-49 (2d Cir.), *cert. denied*, 358 U.S. 821 (1958). The Government submits that Mr. Georgeades and Mr. Zackaroff both merited the description "qualified witness," in that they were employees of the companies from which business records were produced and they showed familiarity with the records. The situation in the instant case is far removed from that of *United States* v. *Rosenstein*, *supra*, where documents of an American owned company were permitted to be introduced through the testimony of a foreign attorney who was neither employed by it nor familiar with its internal operations.

Nor is appellant's contention that the over-the-short-damage reports were defective because of completion "more than one week after the alleged event", an argu-

ment that carries significance. Rule 803(6) speaks of admissibility of records "made at *or near* the time" the underlying event occurs (emphasis supplied). As the Fifth Circuit has observed:

> The requirement that the regular course of business included a timely recording is not to be applied with any technical niggardliness. Dealing with business records, account must be taken of practical considerations. This second element is not to be judged, then, by arbitrary or artificial time limits, measured by hours or days or even weeks. That will depend on the nature of the information recorded, the immutable reliability of the sources from which drawn and similar factors.

Missouri Pacific Railroad Company v. *Austin*, 292 F.2d 415, 422-23 (5th Cir. 1961); 5 Wigmore, § 1550. Given this precedent and the entire circumstances of the instant case, the Government submits that any time gap reflected in the over-short-damage reports does not defeat the admissibility of those records.

Lastly, the Government would call the Court's attention to the nature of the challenged documents themselves and submits that they are by their nature self-authenticating. The appellant interposed no contention that the documents were, on their face, not what they purported to be.[9] The Court, for its part, exercised informed and reasonable discretion in declining to insist on an exhaustive ritual of foundation for documents which were obviously records kept in the ordinary course of business.

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[9] Defense counsel, in his summation, chose not to argue to the jury the question of the authenticity of the documents. The jury was told that this question was "of no concern of yours." (T. 388).

These records established that blank airline tickets were stolen from an interstate shipment.

Appellant characterizes the foundation requirements as a "litany" (Appellant's Brief at 14). He would have this Court reverse a conviction because documents found to be reliable and authentic in the judgment of the trial court were not introduced in perfect conformance with a ritualistic "litany".[10] We suggest that appellant's argument is directed at form rather than substance.

There has been no contention by appellant that the Government's total evidence was inadequate to support a conviction. Admission of the challenged documents into evidence was a proper exercise of judicial discretion.

POINT II

The taped telephone conversation was properly admitted as evidence of continuing similar acts and as admissions by appellant.

Appellant argues that the taped telephone conversation of August 7, 1973, should not have been admitted. He concedes that the conversation "established appellant's *subsequent* participation in transactions involving airline tickets from the same source as those contained in the indictment" (Appellant's Brief at 18) but contends that it could not reflect upon his knowledge, several months earlier, that he possessed stolen tickets. Appellant misconceives the proper evidentiary use of the incriminating

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[10] ". . . Judicial notice of the nature of the business and the nature of the records as observed by the court are often enough to provide a foundation for admissibility." 4 Weinstein's Evidence, § 803(6)(02).

telephone conversation between Alfano and June (E-16 to E-22) by attempting to confine its relevance solely to the issue of knowledge. The substance of the dialogue demonstrates more than casual knowledge; it describes a course of conduct and reveals an intimate familiarity with the illicit trafficking in airline tickets.

The August 7, 1973 conversation constituted, in large part, a reassurance by Alfano to June, a prospective customer for stolen tickets, that the sale would progress smoothly and without danger. Alfano cautioned against seeking a refund on any of the tickets which June was negotiating to purchase. Alfano commented on his own use of tickets in the past without any difficulty. His comments exhibited specific knowledge of how transactions of this kind were arranged.

The conversation, thus, did not take place in a time vacuum. It reflects a continuing course of conduct by appellant and admission by appellant of past conduct. That the trial judge saw the conversation in this light is reflected in his statements that "this is [defendant's] own testimony" and "prior situations [on which appellant was indicted] related to tickets in the same batch . . ." (A. 92). Alfano's statements on the practice of delivery of the tickets only after cash has been advanced and immediately before use, as well as warnings against attempts to obtain refunds on the tickets were inconsistent with defense assertions that Alfano lacked knowledge that the tickets were stolen. The taped conversation was thus clearly admissible. Rule 801(d)(2)(A); *On Lee* v. *United States*, 343 U.S. 747 (1952).

Appellant's argument that subsequent similar acts are irrelevant to the case is not supported by the Federal Rules of Evidence. Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts . . . may . . . be admissible [to prove] motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The Rule makes no distinction between prior and subsequent similar acts; nor does it state that continuing or subsequent acts can not bear on the question of knowledge. This Circuit has recently declared its adherence to an expansive reading of the rule. Similar acts are admissible unless introduced solely to show bad character of a defendant. *United States* v. *Papadakis*, 510 F.2d 287, 294 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975). There is ample precedent confirming that similar acts do bear on the question of knowledge. *United States* v. *Santiago*, 528 F.2d 1130, 1134 (2d Cir. 1976). *United States* v. *Drummond*, 511 F.2d 1049, 1055 (2d Cir.), *cert. denied*, 423 U.S. 844 (1975); *United States* v. *Gardin*, 382 F.2d 601 (2d Cir. 1967); *United States* v. *Ross*, 321 F.2d 61 (2d Cir.), *cert. denied*, 375 U.S. 894 (1963). See also, with reference to subsequent conversations bearing on prior conduct, *United States* v. *Miranda*, 526 F.2d 1319, 1331 (2d Cir. 1975); *United States* v. *Brand*, 79 F.2d 605 (2d Cir. 1935), *cert. denied*, 296 U.S. 655 (1936), (per L. Hand, *J.*).

Lastly, this Court has ruled that conversations or conduct reflecting illegal activities by a defendant over a period of time may be used in a prosecution of a particular act constituting part of the pattern. *United States* v. *Papadakis*, *supra* at 294; *United States* v. *Blassingame*, 427 F.2d 329, 331 (2d Cir. 1970), *cert. denied*, 402 U.S. 945 (1971); *United States* v. *DeSapio*, 435 F.2d 272, 283 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971). The Government submits that the August 7, 1973 call was part of a pattern of conduct and admissible on this basis.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: April 28, 1976

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 30th day of April 1976 he served ~~a copy~~ two copies of the within

Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Jonathan L. Rosner, Esq.
6 E. 43rd Street
New York, N. Y. 10017

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ~~Washington Street~~ 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this

30th day of April 19 76

Carolyn N. Johnson

CAROLYN N. JOHNSON
NOTARY PUBLIC, State of New York
No. 41-4618298
Qualified in Queens County
Term Expires March 30, 1977